
INTERPRETATION OF CONTRACT BY CONTRACTING OFFICER WHERE MEANING OF SPECIFICATIONS IS IN DOUBT.

Where under a contract for dredging, requiring that work thereunder was to be done in strict accordance with instructions of the engineer in charge of the work, and that in case of any doubt as to the meaning of the specifications the decision of the engineer "shall be final," if any doubt arose as to the meaning of a certain specification, providing that the Government should pay at the contract price for "material deposited during the life of the contract," and the Government engineer, acting in good faith, interpreted the same to embrace only "material deposited during the life of the contract" due to natural causes and said interpretation was known to the contractor, the Government will not be liable to said contractor for thereafter removing on his own accord material known to both parties to the contract to be an

artificial deposit due to the direct intervention of third parties, and for which such third parties are responsible and which such third parties could be required by the Government to remove without expense to the Government.

Where a claim depends upon disputed questions of fact between the officers of the Government and the claimant, the accounting officers will not, in general, undertake to determine what the facts are, but will accept the conclusions of the Government officers, leaving the claimant to enforce in court such rights as he may have.

Decision by Assistant Comptroller Mitchell, February 28, 1912:

The San Francisco Bridge Co. appealed December 28, 1911, from settlement No. 14794, of January 30, 1911, by the Auditor for the War Department disallowing their claim for $6,580 for work done in dredging 35,000 cubic yards of material under their contract of May 4, 1908, for certain dredging in Oakland Harbor, Cal.

The auditor disallowed the claim as follows:

"Claim is made for $6,580 alleged to be due for dredging 35,000 yards of material in excess of the amount covered by the contract, which work the company asserts was done under verbal instructions of the assistant engineer in charge of the work. It appears that the city of Oakland in doing some reclamation work allowed a large quantity of material to overflow into the channel, after the contractor had completed his work at that point, and pay is claimed for the removal of this deposit. Under date of December 3, 1910, in a report to Gen. Davis, United States agent, the assistant engineer, L. J. Le Conte, says, 'I did order the dredge captain to take out the natural fill near the Alaska Packers' Association Dock, but did not order him to take out the artificial fill at the foot of Fallon street. Nevertheless, I did tell him that I had no authority to order him to take out an artificial fill, but nevertheless the fact remained that the contract called for full width and full depth at the close of the contract, otherwise his work could not be accepted as a whole. It was up to him to decide for himself, and he concluded to take it out, have his work accepted, get all the money due, close up the contract, and then make a claim for the artificial fill taken out, but not against the United States, which was just as much a sufferer as he is now.'

"Article 7 of the contract reads in part as follows:

"'No claim whatever shall at any time be made upon the United States for any extra work unless such extra work or material shall have been expressly required in writing, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.'

"The work is not covered by the contract or by any written agreement, as required by article 7 of the contract, nor was it ordered by any competent authority; the company has therefore no valid claim against the United States, and the claim is disallowed."

The material facts are as follows:

On May 4, 1908, claimants entered into a contract with the United States whereby, in conformity with certain advertisement and specifications thereunto attached, they agreed to do all dredging included in sections C, D, and E, as specified in paragraph 24 of the specifications hereinafter quoted.

No question arises of damages for noncompletion within the time limit, as under its terms completion was required within 30 months after June 6, 1908, the date of notification of approval of the contract, and the contract was completed sometime in July, 1910.

The contractors have been paid in full, including retained percentages, for all work done under the contract, unless the Government is under a legal liability to pay for redredging 35,000 cubic yards of artificial fill at the foot of Fallon Street, which is the subject of this claim. The contractors accepted final payment under protest.

The contract provides:

"6. If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties; the agreement setting forth fully the reason for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The specifications, which are expressly made a part of the contract, provide:

"6. Whenever the term 'engineer' is used in the specification it is understood to refer to the officer of the Corps of Engineers, United States Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term 'contractor' is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

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"12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases and to carry out any instructions relative to the work which may be given by the engineer, either personally or through an authorized representative.

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"17. Payments will be made monthly, subject to the provisions of paragraph 39 of these specifications. A percentage of 10 per cent will be reserved from each payment until 500,000 cubic yards of material, measured in place, have been excavated on a contract; thereafter monthly payments on that contract will be made in full, provided satisfactory progress has been maintained. The retained percentages will not be paid until the satisfactory completion of the contract.

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"24. *Second contract.* Sections C, D, and E. Total amount estimated, 1,916,700 cubic yards, of which 786,400 is estimated as hardpan and 1,130,300 as soft material.

"*Section C.*—East line of Fallon Street to entrance to tidal basin, 3,100 feet. Present channel 300 feet wide and 17 feet deep; proposed channel 300 feet wide and 25 feet deep. Estimated quantity of material, 332,000 cubic yards of soft, sandy mud. Overdepth soft material.

"*Section D.*—East Oakland or Northern Channel in tidal basin, 7,800 feet. Present channel 300 feet wide and 8 feet deep; proposed channel 300 feet wide and 17 feet deep. Estimated quantity of material, 611,000 cubic yards of hardpan and 361,000 cubic yards of soft, sandy mud. Overdepth largely hardpan.

"*Section E.*—Alameda or Southern Channel in tidal basin, 6,200 feet. Present channel 300 feet wide and 12 feet deep; proposed channel 300 feet wide and 17 feet deep. Estimated quantity of material, 175,400 cubic yards of hardpan and 437,300 cubic yards of soft sandy mud. Overdepth mostly soft material."

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"27. *Order of the work.*—The order in which the work shall be done shall be determined by the engineer. In the first contract the probable order will be first between Chestnut Street and Fallon Street and then between Chestnut Street and the bay; in the second contract work will probably be begun at Fallon Street and continued around the tidal basin.

"28. No method of dredging which does not leave a clear channel of the specified depth behind the dredge will be permitted.

"29. At the completion of the work a survey will be made, and all material deposited during the life of the contracts above the depths specified and side slopes of one on one shall be removed. Such material will be paid for at contract price. Overdepths up to 1 foot found to exist, or made on redredging, will be paid for at one-half the contract price.

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"35. When required by the engineer, and upon the completion of the work, the contractors shall remove all their plant and appliances, including buoys, piles, gauge piles, ranges, etc., and shall leave the channel in good order, clear, and fit for navigation.

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"41. The work will be conducted in strict accordance with the instructions of the engineer. All operations connected with the work will be done under the immediate supervision of assistant engineers, inspectors, or other agents of the engineer. Such agents are not authorized to make, alter, or discharge contracts, or to grant extensions or waivers of time limit. In case of any doubt as to the meaning of these specifications, the decision of the engineer shall be final."

The artificial fill, for the removal of which this claim is made, occurred June 22, 1909, and was caused by a break in the retaining levee made by the city of Oakland for reclamation purposes. The material which escaped through the break ran into and filled a "slip" of a concern called "The Sunset Lumber Co.," and, continuing, overflowed into the United States channel near the foot of Fallon Street, an area which had nearly a year prior thereto been dredged by the contractors to the depth required by the contract.

An official resurvey was made in October, 1909, and on October 22, 1909, Lieut. Col. Biddle, the contracting officer who was then in charge of the work, having previously given the city of Oakland notice of the encroachment and requested its removal, again requested that immediate steps be taken to remove the obstruction. In reply to this the mayor of Oakland, by letter of October 29, 1909, stated that the matter would be taken up with the city engineer.

The city of Oakland did not remove the obstruction, but, 17 days after this claim for $6,580 against the United States was filed by the claimants, for removing the artificial fill caused by the city, an appropriation of $6,750 was made by said city to pay in full the claim of the Sunset Lumber Co. for dredging the lumber company's channel free of silt due to the same break in the city's retaining levee that caused the fill in the Government's channel, for the removal of which the contractors are now claiming $6,580.

It is stated by the engineer officer in charge of the work that the contractors, claimants herein, were well aware of the conditions under which the escaped material had reached the channel, and that said contractors knew the city of Oakland was at fault and should bear the expense of removing the material as an unlawful deposit in navigable waters.

The contractors in their claim, as filed with the auditor, refer to and quote what the Government's officers state as to their (contractors') knowledge that the material in question was an artificial deposit and of the source from which it came; and they do not deny that they had such knowledge.

The contractors contend that whether the deposit was, or was not, an artificial and unlawful one, the Government, under provisions of paragraph 29 of the specifications, *supra*, is liable to them for its removal.

By paragraph 41 of the specifications the work was to be conducted in strict accordance with instructions of the engineer and in case of any doubt as to the meaning of the specifications, the decision of the engineer "shall be final." If the city of Oakland constructed a levee it was its duty to so construct it that it should be reasonably safe, and to maintain it in a reasonably safe condition; and if it failed to do so and the levee broke, causing the 35,000 cubic yards

of dirt or mud in question to wash into the channel, as already has been stated, it would seem that for the injury to the channel so caused the city would be liable to the United States, and that the United States could require the city to remove the fill so caused and, if it failed to do so, to respond in damages.

The fill so caused was because of the defective levee, and the levee was not the result of natural causes but the direct work of the city.

The engineer officers seem to contend that "all material deposited during the life of the contract" mentioned in paragraph 29 of the specifications, has reference to "material deposited during the life of the contract" by natural causes, but not causes which are the result of the direct intervention of third parties and for which such third parties are responsible, while claimants interpret said paragraph 29 to embrace "material deposited during the life of the contract" wholly regardless of what caused such material to be deposited.

Paragraph 41 of the specifications expressly provides that "in case of any doubt as to the meaning of these specifications, the decision of the engineer shall be final," and if a doubt arose as to the meaning of said paragraph 29, and the engineer decided that the "material deposited during the life of the contract" did not embrace material deposited as was the 35,000 cubic yards in question, but only to material deposited from natural causes which was not the result of the intervention of third parties, and for which such third parties were responsible, it would see that such decision by the engineer in good faith would be binding on the claimants.

The engineer officers and the contractors, claimants herein, likewise do not agree as to the facts in the case.

The contractors claim that they were orally directed by L. J. Le Conte, an assistant engineer, to redredge the area in question at the foot of Fallon Street. Their claim that they were directed to redredge this area is supported by the affidavit dated December 11, 1911, of the captain who was in charge of their dredging operations. Said captain states that when the order to redredge at the foot of Fallon Street

was given by Mr. Le Conte, nothing was said regarding payment for the work, but affiant also states that some weeks prior thereto Mr. Le Conte, in a conversation with reference to redredging, said that the contractors would be paid the full contract price for doing the redredging.

Asst. Engineer Le Conte denies that he directed the work to be done and, on the contrary, he states that he did tell the captain of the dredge that he (Le Conte) had no authority to order him to take out the artificial fill at the foot of Fallon Street. The assistant engineer, in a report dated December 3, 1910, to Brig. Gen. Davis, states:

"In order to make things clear it should be stated that the final survey showed two shoal spots, both above the required depth called for in the contract, one a natural fill off the Alaska Packers Association Dock at the foot of Paree Street, city of Alameda; the other an artificial fill off the foot of Fallon Street in the city of Oakland. I did order the dredge captain to take out the natural fill near the Alaska Packers Association Dock but did not order him to take out the artificial fill at the foot of Fallon Street. Nevertheless I did tell him that I had no authority to order him to take out an artificial fill, but nevertheless the fact remained that the contract called for full width and full depth at the close of the contract, otherwise his work could not be accepted as a whole. It was up to him to decide for himself, and he concluded to take it out, have his work accepted, get all the money due him plus retained percentages, close up the contract, and then make a claim for the artificial fill taken out, but not against the United States, who formerly was just as much a sufferer as he is now."

Mr. Le Conte's statement shows that the contractors had notice, prior to removing the artificial fill, of the Government's officers' interpretation of paragraph 29 of the specifications, and that the material therein mentioned was restricted to that deposited by natural causes and did not include such as was the known result of the direct intervention of third parties.

That such was the interpretation of the Government's officers is further shown by the letter of Gen. Davis, July 27, 1910, to the contractors as follows:

"I did not authorize the assistant engineer to have this work done, did not know it was to be done until after it had been done, and, furthermore, have no authority to do the work in question or to pay for it, and hereby disclaim any responsibility for anything the assistant engineer may have done in the premises.

"*Knowing that the material in question was an artificial* and unlawful deposit, and knowing the location and extent of the shoal and the source from which the material came, you erred in doing the work without first obtaining the instructions of the engineer in charge. The work is not considered a legal obligation against the United States and can not be paid for from any funds in my possession.

"The assistant engineer denies that he instructed you to do the work as a proper charge against the United States."

The contractors, July 29, 1910, wrote Gen. Davis:

"We believe these orders were given with the knowledge of Col. Biddle, who was at the engineer's office up to the time that the dredge actually commenced this redredging. We understand Gen. Davis did not reach the San Francisco office until July 14, which was subsequent to the time orders for the work were given."

That orders to redredge were given with Col. Biddle's knowledge, as alleged by contractors, is denied by Col. Biddle, who states that his recollection is, "that it was always understood that the city (of Oakland) or private persons would have to pay for the work, at any rate not the United States."

Gen. Davis in his report of August 18, 1910, to the Chief of Engineers states (paragraph 5) that—

"* * * the inspector (Mr. Le Conte) reported to this office the completion of the work and the removal of this shoal, but stated that he had *told the contractor* that he would have to look to the city of Oakland to pay for removing this shoal."

From the foregoing statements it is evident that there is an irreconcilable conflict of evidence as to material facts. If the Government's officers are to be believed the contractors knew before they did the work in question that, under the Government engineer's interpretation, the contract did not embrace the removal of the artificial deposit and that the Government would not pay for such removal, and furthermore that the Government's officers did not authorize or order its removal.

As above stated, under the provisions of paragraph 41 of the contract, the engineer's interpretation of the meaning of the specifications, acting in good faith, would be conclusive.

I am not equipped with the machinery of the courts for determining the disputed questions of fact arising between claimants and the Government's officers. The action of the auditor is affirmed. The disallowance by this office does not preclude the appellant from suing in the courts which are equipped for the trial of questions of fact if he so desires. (5 Comp. Dec., 273; 7 *id.*, 69; 14 *id.*, 452; 46 MS. Comp. Dec., 1116, Aug. 20, 1908.)